No. 73-190.

# Supreme Court of the United States

October Term, 1973.

**ISADORE H. BELLIS,**

*Petitioner,*

*v.*

**UNITED STATES OF AMERICA.**

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

# BRIEF FOR THE PETITIONER.

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## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The opinion of the Court of Appeals (A. *13-16) is not yet reported. The opinion of the District Court (A. *1-11) is not yet reported.

### JURISDICTION.

The judgment of the Court of Appeals was entered on July 9, 1973 (A. *17) and the petition for rehearing was denied on July 20, 1973 (A. *18). The petition for a writ of certiorari was filed on July 27, 1973 and was granted on October 15, 1973. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

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* Page references to Appendix marked with an asterisk are to the Appendix to the Petition for Certiorari. Without an asterisk they are to the Single Appendix.

## QUESTION PRESENTED.

Whether a partner of a three-man law partnership in the process of winding up after dissolution may invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury subpoena duces tecum, of financial books and records of the partnership in his rightful possession.

## UNITED STATES CONSTITUTIONAL PROVISION INVOLVED.

**Amendment V.**

No person . . . shall be compelled in any criminal case to be a witness against himself. . . .

## STATEMENT OF THE CASE.

This case presents the question as to whether partnership books and records are ever protected from compulsory production on Fifth Amendment self-incrimination grounds.

The facts material to the question are not in dispute and are set forth by the Court below as follows (A. *14-15):

The subpoenaed documents are the partnership records of a three-man law partnership for the years 1968 and 1969. The partnership also had about six additional employees. Petitioner was the senior partner and personally supervised the work of the bookkeeper.[1] The partnership was dissolved in the latter part of 1969 and is still in the process of being wound up. After formal dissolution, the partnership records remained in the office of the partnership pending the winding up. However, at the time the subpoena was served, they were in the Petitioner's rightful possession.[2]

Petitioner was served with a Federal Grand Jury Subpoena directing him to appear and testify and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years

1. Petitioner's secretary testified that she was also the office manager and bookkeeper of the firm (A. 82); that her duties in connection with the books of the firm were, under the supervision of the firm's accountant, to make the entries, to enter receipts and disbursements, write checks and the like (A. 83); that personal expenses of the partners were sometimes reflected on the books of the firm; that from time to time she was instructed to pay country club bills or restaurant charges with partnership checks (A. 92-93); that the bills were usually broken down into business and personal expenses and any personal expenses would be charged to the drawing account of the partner involved (A. 92-93); and that the firm's accountant was also given access to these records in order to enable him to prepare the partnership tax returns (A. 94).

2. The Court below stated the sole issue to be "whether an individual partner, assumedly in lawful possession of partnership records of a dissolved partnership, may refuse to produce such records on the ground that such production would be in violation of his Fifth Amendment rights (A. *15).

1968 and 1969". Petitioner appeared and refused to produce the documents or answer any questions in connection therewith, asserting his rights under the First, Fourth, Fifth and Sixth Amendments to the United States Constitution. Thereupon, the United States filed a motion in the District Court to compel the Petitioner to produce the books and records described in the subpoena. The Petitioner confined his claim to his Fifth Amendment privilege.

The District Court ruled, inter alia, that since the documents were partnership papers, they were not subject to Petitioner's personal privilege. It then, under 28 U. S. C. 1826, ordered Petitioner held in civil contempt until he should produce the books and records sought (A. *11). However, the Court excluded from its Order "any individual client files containing any advice and confidential relationships between the attorney and attorney and client" (A. *14-15; A. 116), but did require that Petitioner turn over "any cash receipts books, cash disbursement books or books of records and accounts of the partnership for the years in question" (A. 116).

The Court of Appeals affirmed, stating that it was satisfied that the privilege against self-incrimination was not to apply to the possession of records of an entity such as a partnership which has a recognizable juridical existence apart from its members, despite the modest size of the partnership entity, although it also recognized that the decision of this Court in *United States v. White*, 322 U. S. 694 (1944) seems to lay down a more involved test (A. *15-16).

## SUMMARY OF ARGUMENT.

The Court below erroneously held that a partner in a three-man law partnership may not invoke his Fifth Amendment privilege against compulsory self-incrimination to prevent the production, pursuant to a Grand Jury subpoena duces tecum, of financial books and records of the partnership in his rightful and lawful possession. In so doing, it ignored the basic concepts underlying one's right to assert his Fifth Amendment privilege as formulated by this Court.

The incriminating nature of the partnership books is testimonial or communicative. They contain records of receipts and disbursements and transactions with clients. In addition there is present the communication inherent in admitting their identity and authenticity in response to the subpoena. *Schmerber v. California,* 384 U. S. 757 (1966). Petitioner is in possession of the sought after documents, the subpoena duces tecum is addressed to him. Thus, the ingredient of personal compulsion (the essential element found lacking in *Couch v. United States,* 409 U. S. 322 (1973)) is obviously present here.

There is no difference between compelling a man to produce his private books and papers to be used in evidence against him, and compelling him to be a witness against himself. *Boyd v. United States,* 116 U. S. 616 (1896).

Although the partnership books and records may not have been Petitioner's private property, they were held in Petitioner's possession in a purely personal capacity within his private enclave, sufficient for assertion of the privilege. *United States v. White,* 322 U. S. 694 (1944); *Murphy v. Waterfront Commission,* 378 U. S. 52 (1964).

Petitioner's Fifth Amendment claim thus must be respected unless there is something significantly unique about the nature of the books and records of a small, closely held law partnership. We submit there is not.

It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. *Hale v. Henkel,* 201 U. S. 43 (1906). Nor may a custodian of the corporate books and records withhold them on the ground that he personally might be incriminated by their production. *Wilson v. United States,* 221 U. S. 361 (1911). Even after the dissolution of a corporation and the transfer of its books to its sole stockholder, he may not invoke the privilege with respect to the former corporate records. *Grant v. United States,* 227 U. S. 74 (1913). This is based in part on the visitorial powers doctrine inherent in the state charter of the corporation. Thus, when documents are held by a custodian in a representative capacity, the size and character of the corporate or other entity he represents is immaterial.

On the other hand, recognizing that the visitorial powers doctrine would not be sufficient to explain the Government's legitimate need also to regulate and inspect economically influential unincorporated associations, the Court in *White* formulated the test for denying the privilege to such organization to be whether

> "one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

Structurally and functionally, the instant three-man law partnership embraces a degree of privacy which attends the inspection and disclosure of its records, a degree of intimacy of the information they contain and a field of com-

mon endeavor embodying substantially identical (i.e. personal) interests of each of the members, all factors opposed to organized institutional activity. Just as in a sole proprietorship, the partnership books and records in their creation, maintenance and intimacy were no more distinct from the individually owned books and records of the partners than would be true if each were practicing law as a sole practitioner.

The nature of the small law firm as a common enterprise with an identified and limited number of interested law partners engaged in practicing their profession, with the books properly recording elements of both partnership business and individual personal expenses, and with the right of each of the three partners but no other individuals to inspect the books, embodies and represents the private and personal interests of each of the members and no waiver of privacy.

That the books may have been seen or indeed written by some employee of the partnership or its accountant in no way defeats the privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were written by another person. *Boyd v. United States, supra; Wilson v. United States, supra.*

Moreover, as the Government has conceded in its Brief in Opposition to the Petition for Certiorari, the Fifth Amendment privilege is not limited to the sole proprietor and can protect two or more persons joined together in some form of association. If this be so, it follows that the physical possession of the books and records of such an association must reside at any one time in one of the associates, so as to allow him to assert the privilege. It is this type of purely personal capacity possession that Petitioner held here, and if this does not qualify for protection under the Fifth Amendment, nothing can.

## ARGUMENT.

### I. Introduction.

The Order of the District Court requires Petitioner to produce the books and records of his dissolved three-man law partnership which, during the period of winding up, were in his possession at the time the summons was issued (A. 116). The Court below correctly understood the issue to be whether Petitioner, as an individual partner, in lawful possession of these partnership records, could refuse to produce such records on the ground that such production would violate his Fifth Amendment rights (A. *15).

The importance of preserving inviolate the privilege against compulsory self-incrimination has often and recently been stated by this Court. *Couch v. United States*, 409 U. S. 322 (1973). In *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964), this Court set forth at length the policies and purposes of the privilege:

> ". . . our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load.' . . . our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life.' . . ."

The essence of the privilege against self-incrimination is the protection of the individual from government com-

pulsion to testify against himself. Emphasis by this Court that the privilege is "a personal one" (*United States v. White*, 322 U. S. 694, 698-699 (1944)), "a *personal* privilege: [adhering] basically to the person, not to information which may incriminate him" (*Couch v. United States, supra*, at 328) means just this: that personal compulsion against an accused must be present, "coercion against a potentially accused person compelling [him], against [his] will, to utter self-condemning words or produce incriminating documents" (*Id.* at 329).

In the case at bar, the Petitioner is in possession of the sought after documents. The subpoena duces tecum is addressed to him. Thus, the ingredient of personal compulsion (the essential element found lacking in *Couch*), is obviously present here. Petitioner's Fifth Amendment claim thus must be respected, unless there is something significantly unique about the nature of the books and records of a small, closely held partnership to require a different result. We submit there is not.

**A. Private Papers.**

The development of the constitutional protection afforded books and records from compulsory production stems from *Boyd v. United States*, 116 U. S. 616 (1896), a case whose controlling Fifth Amendment authority has remained unimpaired and which has been characterized as "among the greatest constitutional decisions of this Court" (*Schmerber v. California*, 384 U. S. 757, 776 (1966) (dissenting opinion)), where this Court said at page 633

> "and we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

*Boyd* involved a charge that some 35 cases of plate glass had been imported to this Country from England by the firm of E. A. Boyd & Sons by means of a fraudulent or false invoice or other document and an Order of the District Court requiring the claimants of the goods to produce an invoice from the English seller showing the quantity and value of the glass contained in 29 of the cases.

Emphasis that "a man's private papers [cannot be used] to establish a criminal charge against him or to forfeit his private property" (*Boyd*, p. 622, 630), where the private paper was the invoice of the foreign shipper, has reference to the concept of "private property" only. This is carried over in the *White* case where it is observed that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege. . . ." (p. 699).

Similarly, the observation in *Couch* (p. 330) that the *Boyd* production order was directed against the owner of the property who by responding would have been forced to "produce and authenticate any personal documents or effects that might incriminate him", again confirms that description of the books and records as "private" or "personal" refers to individually owned and possessed documents and not to the degree of privacy which attended the creation or maintenance of the records or upon the degree of intimacy of the information which they contain. See *United States v. Cohen*, 388 F. 2d 464, 471 (CA 9, 1967).

Thus, the facts that the books and records of the instant partnership, including the cash receipts and cash disbursements journal of the firm, may have been kept by one of the firm's employees who served as bookkeeper, that they reflected transactions in which each of the partners had a direct interest to the extent of his share of profits and losses of the firm and they were used by the firm's

accountant to prepare its partnership tax returns are equally applicable to the books and records of most sole proprietors. There has never been the requirement that the books must be maintained and kept personally by the person against whom the subpoena is issued. In fact, in *Wilson v. United States,* 221 U. S. 361, 378 (1911), Mr. Justice Hughes stated

> "It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. Where one's private documents would tend to incriminate him, the privilege exists although they were written by another person"

See also, *Schmerber v. California, supra.*

**B. Private Enclave.**

Tied-in with the concept of the possession of individually or privately owned books and records is the policy of the Fifth Amendment to protect

> "the right of each individual 'to a private enclave where he may lead a private life' . . ." (*Murphy v. Waterfront Commission, supra.*)

Here again the emphasis is not that the privilege is limited to documents prepared by the claimant himself or containing his own incriminating statements of fact. Instead, it is to the retention in himself of the privacy of his own records. Thus, as this Court observed in *Couch,* (p. 332) in explaining *Perlman v. United States,* 274 U. S. 7 (1918), where the Court held the privilege unavailable to a party seeking to suppress the admission of certain incriminating documents and exhibits before a Grand Jury, the movant's expectations of privacy in the exhibits had

been destroyed because he voluntarily had surrendered them as evidence in a patent infringement case he had earlier brought in the federal district court. The movant attempted unsuccessfully, where possession voluntarily had been delivered to another, to equate ownership with the scope of the privilege. But compulsion against the other does not invade the private enclave of the claimant.

On the other hand, in *Couch,* even after the taxpayer delivered the records to her accountant with no justifiable expectation of privacy, there can be no doubt that once the books and records had been returned to her, although the accountant could testify as to what he remembered they contained, a Fifth Amendment privilege against compulsory production would prevail had the government sought to subpoena them in the hands of the taxpayer.

In essence, we submit that neither the private papers nor the privacy aspect of the privilege can be used by the government in a backhanded way to support its claim that where a claimant expects that someone else may see his books and records (i.e. where a bookkeeper makes the entries or an accountant prepares tax returns therefrom), no Fifth Amendment privilege exists. Such a conclusion, as previously noted, would mean that the taxpayer would have to make his own entries and never let the books out of his sight in order to assert a right guaranteed to him by the Constitution. To merely state the argument serves to demolish it.

No matter how many times a defendant in a criminal case may have confessed guilt to others, he still cannot be compelled to be a witness against himself. Similarly, the fact that the books and records of a three-man law partnership may have been looked at by the partners or their accountant, does not mean that when they are safely in the rightful possession of one of the partners, the government can pry them open by subpoena.

**C. Personal Capacity Possession.**

This Court also observed in *Couch* (p. 330, n. 10)

> "A later court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege *or at least in his possession in a purely personal capacity'. United States v. White,* 322 U. S. 694, 699 (1944)." (Emphasis added in *Couch.*)

As already noted, the term "private" has a dual meaning, but in the context of "papers", refers to individual ownership as opposed to the degree of privacy which attended the creation or maintenance of the particular records or the degree of intimacy of the information which they contain. Similarly, as noted in Part II, *infra,* the terms "personal" and "impersonal" present somewhat the same opportunity for varying meanings. In the context of the possessory nature which the claimant must have, however, it is submitted that the phrase "in a purely personal capacity" refers to papers rightfully held by a non-owner or a co-owner, but not in a "representative capacity" on behalf of a "collective group", and not by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them". See *McPhaul v. United States,* 364 U. S. 372, 380 (1960); *Curcio v. United States,* 354 U. S. 118, 122-123 (1957); *Rogers v. United States,* 340 U. S. 367 (1951); *United States v. Fleischman,* 339 U. S. 349 (1950).

Custodians of organizational records may not frustrate the public policy underlying the organization's lack of privilege, as explained hereinafter, by withholding the organization's official records from examination by public

authorities under a claim of personal privilege. But the Fifth Amendment does not make ownership of subpoenaed documents absolutely essential to a claim of privilege. It is the possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. *Couch v. United States, supra,* p. 333.

Accordingly, the *White* case recognizes that something more than "the private property of the person claiming the privilege" is protected, since the "private property" concept itself requires conjunction of possession and ownership, except in those possible areas referred to in notes 15 to 18 in *Couch,* where "constructive possession is so clear or the relinquishment of possession so temporary and insignificant as to leave the personal compulsion upon the accused substantially intact". The something more is the rightful possession even of a non-owner entitling him to assert the privilege, recognized as a viable proposition by the *Couch* citation in footnote 12 of the case of *United States v. Cohen,* 388 F. 2d 464, 468 (CA 9, 1967).

In *Cohen,* the accountant delivered his work papers to the taxpayer before the summons was issued against the taxpayer seeking the accountant's work papers, and the accountant was content to leave the papers in the possession of the taxpayer, not as custodian holding them for the accountant or as his representative subject to his command, but in a purely non-custodial or non-representative personal capacity, possessing papers owned by another.

In the case at bar, co-ownership and possession must be deemed in Petitioner. No one has a superior possessory or property right in the books and records. He holds them in no representative capacity and so long as the partnership records themselves are protected, government compulsion against the person of Petitioner must be denied.

**D. Testimonial or Communicative Incrimination.**

The potential incriminating character of the financial and business books and records of Petitioner's partnership, for income tax purposes, appears to be so obvious that the government has not suggested, nor did the Court below indicate, any reservation in this connection. As indicated at the hearing before the District Court (A. 65-66), the books could show records of receipts which Petitioner authorized to be included in the books but which the government may claim were never reported in his income tax returns. The records could disclose the source of funds received which the government may claim to be in violation of some federal law. Likewise, the failure of the books and records to contain a record of a receipt which the government may claim Petitioner in fact received in connection with his law partnership, may tend to support an allegation that it was omitted from his tax return. See Proposed Rules of Evidence for the United States District Courts and Magistrates, 1971 revised draft, Rule 803(7). Thus, the "testimonial or communicative nature" of the records is obvious. *Schmerber v. California, supra,* p. 761.

Further, the government agreed in *Hill v. Philpott,* 445 F. 2d 144 (CA 7, 1971), certiorari denied, 404 U. S. 991, referred to with approval in *Couch v. United States, supra,* p. 330, that the daily financial records of a taxpayer's legitimate business, consisting in most instances of a running account of charges and payments of clients and customers, although not reflecting thoughts, opinions, beliefs or predilections of their possessors, (*Cf. Stanford v. Texas,* 379 U. S. 476, 485 n. 16) are distinguishable from records of an illegal business such as gambling (*United States v. Hanon,* 428 F. 2d 101, 106-107 (CA 8, 1970), certiorari denied 402 U. S. 952; *Blank v. United States,* 459 F. 2d 383 (CA 6, 1972), certiorari denied 409 U. S. 887) and are protected

from compulsory production on Fifth Amendment grounds against an Internal Revenue Service summons.[3]

Although "the longstanding principle that 'the public . . . has a right to every man's evidence' . . . is particularly applicable to grand jury proceedings" (*Branzburg v. Hayes*, 408 U. S. 665, 682 (1972), "[t]he grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him". *United States v. Dionisio*, 93 S. Ct. 764, 769-770 (1973) citing *Boyd v. United States, supra*, as the authority.

Accordingly, once it is established that the partnership books and records are covered by the Fifth Amendment privilege, the claim of Petitioner must be granted.

## II. Books and Records of a Small Closely-Held Partnership Are Covered by the Fifth Amendment Privilege.

The Court below, in concluding that the Petitioner was not entitled to assert the Fifth Amendment personal priv-

3. It is important to note that in the Petition for Writ of Certiorari filed by the Government in *Philpott v. Hill*, No. 71-442, October Term, 1971, the Government even conceded that "Where the government proceeds by summons or subpoena, the taxpayer is necessarily required to testify against himself as a witness. Even when he is called upon to do no more than produce certain documents, 'he would be at any time liable to make oath to the authenticity or origin of the articles produced.' 8 Wigmore, *Evidence* (3d ed.). § 2264, p. 364. Such testimonial compulsion is specifically prohibited by the Fifth Amendment. See *Curcio v. United States*, 354 U. S. 118, 125.[10]

"[10] *Boyd v. United States, supra*, relied on by the court below, involved a subpoena issued to the accused personally; it therefore presented a most straightforward self-incrimination claim (116 U. S. at 638-641, Miller, J., concurring). Even if the object sought by subpoena in *Boyd* had been a weapon or contraband or fruits of a crime, the Fifth Amendment privilege against self-incrimination would have entitled the defendant to refuse to comply because in responding to the subpoena he would have to produce and authenticate the incriminating evidence. See *Curcio v. United States, supra*, 354 U. S. at 125; *United States v. White*, 322 U. S. 694, 698-699."

ilege with respect to the records of his three-man law firm in his lawful possession was (A. *15-16)

> "satisfied that it was not intended that the privilege was to apply to the possession of the books and records of an entity such as a partnership which has a recognized juridical existence apart from its members . . . despite the modest size of the partnership entity."

In so doing, it ignored the *Boyd* case which itself involved a subpoena [4] directed to a partnership for which a general partner was entitled to refuse to produce documents incriminating in content, and misread the functional teachings of *White* to justify automatic denial of the protection solely by reason of the separate legal identity of the partnership, despite the fact that with co-ownership and rightful, peaceful possession vested in Petitioner, enforcement of the subpoena would involve the prohibited government compulsion directly against his person. *Couch v. United States, supra.*

At the turn of the century, after the decision in *Boyd*, the compulsory production of papers by process became a live issue to be resolved mainly on Fifth Amendment grounds. *In re Mal Brothers Contracting Co.*, 444 F. 2d 615, 618 (CA 3, 1970). It was in this era that the "visitorial powers doctrine" was formulated to deny Fifth Amendment privilege to corporate records and to make the privilege inapplicable even if the production of the corporate records would tend to incriminate the custodial officer, and even if he were the sole stockholder of a dissolved corporation.

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4. *United States v. Dionisio, supra,* observed in footnote 10 that "While *Boyd* was concerned with a motion to produce invoices at a forfeiture trial, the Court treated it as the equivalent of a subpoena duces tecum and *Hale v. Henkel,* 201 U. S. 43, 76 applied *Boyd* in the context of a grand jury subpoena".

Thus, in *Hale v. Henkel,* 201 U. S. 43, 74-75 (1906), this Court noted that

> "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way. His power to contract is unlimited. He owes no duty to the state or to his neighbors to divulge his business, or to open his doors to an investigation, so far as it may tend to incriminate him. He owes no duty to the state since he received nothing therefrom, beyond the protection of his life and property. His rights are such as existed by the law of the land long antecedent to the organization of the state. . . ."

as compared to the corporation which

> "is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. There is a reserved right in the legislature to investigate its contracts and find out whether it has exceeeded its powers. It would be a strange anomaly to hold that a state, having chartered a corporation to make use of certain franchises, could not, in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. The defense amounts to this: That an officer of a corporation which is charged with a criminal violation of the statute may plead the criminality of such corporation as a refusal to produce its books. To state

this proposition is to answer it. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.

"... Being subject to this dual sovereignty, the general government possesses the same right to see that its own laws are respected as the state would have with respect to the special franchises vested in it by the laws of the state. The powers of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress."

*Wilson v. United States,* 211 U. S. 361, 382 (1911) expressed the same thought in the following manner as to the status of books and papers of a private corporation:

"They are not public records in the sense that they relate to public transactions, or, in the absence of particular requirements, are open to general inspection, or must be kept or filed in a special manner. They have reference to business transacted for the benefit of the group of individuals whose association has the advantage of corporate organization. But the corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books. That demand, expressed in lawful process, confining its requirements within the limits which reason imposes in the circumstances of the case, the corporation has no privilege to refuse. It cannot resist production upon the ground of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law, and to inflict punishment by for-

feiture of franchises or otherwise, it must submit its books and papers to duly constituted authority when demand is suitably made. This is involved in the reservation of the visitorial power of the state, and in the authority of the national government where the corporate activities are in the domain subject to the powers of Congress."

Moreover, *Wilson* then extended the inapplicability of the Fifth Amendment privilege to the corporate records even if the production of those records would tend to incriminate the custodial officer. Thus, the Court said (p. 384-385):

"The appellant held the corporate books subject to the corporate duty. If the corporation were guilty of misconduct, he could not withhold its books to save it; and if he were implicated in the violations of law, he could not withhold the books to protect himself from the effect of their disclosures. The reserved power of visitation would seriously be embarrassed, if not wholly defeated in its effective exercise, if guilty officers could refuse inspection of the records and papers of the corporation. No personal privilege to which they are entitled requires such a conclusion. . . . But the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books, without regard to the conduct of the custodian.

"Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. . . . When the appellant himself became president of the corporation, and as such held and used its books for the transaction of its business committed to his

> charge, he was at all times subject to its direction, and the books continuously remained under its control. If another took his place, his custody would yield. He could assert no personal right to retain the corporate books against any demand of government which the corporation was bound to recognize."

Finally, in *Grant v. United States,* 227 U. S. 74 (1913), this Court extended *Wilson* to cover the case of documents even owned by the sole stockholder of a dissolved corporation.

Because of the Court's reliance in *Hale* and *Wilson* on the technical visitorial powers doctrine rather than on the government's legitimate need to regulate economically influential organizations, the question arose, to be presented in main part in *United States v. White, supra,* whether the privilege was applicable to all books and records, with the *Hale* and *Wilson* denial applicable only to papers of corporate entities or whether no books and records were protected except those personally owned and possessed by the individual claiming the privilege. See *United States v. Egenberg,* 443 F. 2d 512 (CA 3, 1971).

*White* involved a subpoena duces tecum addressed to "Local No. 542, International Union of Operating Engineers" to produce before the Grand Jury copies of its constitution and by-laws and specifically enumerated union records showing its collections of work permit fees, including the amounts paid therefor and the identity of the payors for a specified period (p. 695). A Mr. Jasper White appeared in response to the subpoena before the Grand Jury, describing himself as the assistant supervisor of the Union and admitted that he had the demanded documents in his possession but declined to produce them "upon the ground they might tend to incriminate Local Union 542,

International Union of Operating Engineers, myself as an officer therefor, or individually" (p. 696).

This Court, in holding that neither the union nor White as an individual officer could invoke the privilege of self-incrimination as the ground for refusing production of the Union's records emphasized a dual approach to the problem, ignored by the Court below.

*White* first recognized that (p. 699)

> "Since the privilege against self-incrimination is purely a personal one, it cannot be utilized by or on behalf of the organization, such as a corporation . . . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity . . . . individuals when acting as representatives of a collective group cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations . . . . the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers may tend to incriminate them personally . . . . such records and papers are not the private records of the individual members or officers of the organization."

This aspect of the test merely confirms what the Court held in *Hale, Wilson* and *Grant*. The privilege "applying only to natural individuals" (*White*, p. 698) is a personal privilege requiring compulsion against the person

of the witness in possession of the books and records. *Couch v. United States, supra.* It cannot be utilized by or on behalf of any organization such as a corporation which the state charters and over which it has visitorial powers (*Hale, Wilson*), regardless of the size of the organization, and thus is inapplicable even to the solely owned corporation. *Grant.*

Thus, when the documents are held by a custodian in a representative capacity, the size or character of the corporate or other entity that he represents is immaterial. It is in these circumstances that the size and nature of the business entity is to be ignored.

Disregard of the size of the membership and scope of the activities in the solely owned corporation situation is not unduly restrictive or opposed to Petitioner's position. The proprietor has the voluntary choice to operate his business in the unincorporated proprietorship form or use the corporate entity. A part of the price which he has to pay for the corporate advantage voluntarily chosen is vulnerability to production of incriminating corporate documents. *Cf. Moline Products, Inc. v. Commissioner,* 319 U. S. 436 (1943).

On the other hand, the three-man law firm in which Petitioner was a member had the choice to engage in the practice of law as a professional corporation or as a partnership, but the members could not be associated to practice their profession as co-owners for mutual benefit and profit as individual practitioners.

Hence, the test cannot mean, as the Court below construed it, that whenever more than one person is involved in some joint enterprise, the enterprise constitutes an organization separate and apart from the individuals so that the records are always held by a member in a representative capacity and never subject to a claim of privilege.

The fallacy in this approach is evidenced by the second aspect of the test set forth in *White* which plainly recognizes that the privilege is not limited solely to the individual or sole proprietor but can be claimed on behalf of a certain type of collective group of natural persons, with the privilege denied where (p. 701)

> "one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity."

Recognizing that the visitorial powers doctrine could not apply to a labor union since it was a non-corporate association, this Court described visitorial powers as a convenient vehicle to justify a necessary government power of inspection, equating it with the government's legitimate need also to regulate economically influential associations (p. 700).

It should now be observed that the elements of "personal privacy" (p. 700), "purely private or personal interests of its constituents" and the "impersonal" character in the scope of the organization's membership and activities are cast in a completely different light from the concepts of "private papers" (private property) of the person claiming the privilege or the purely "personal" capacity of the possession. As previously pointed out, the latter use refers to the records held by the claimant as his own private property or in a non-custodial or non-representative capacity, such as was present in *United States v. Cohen, supra,* and

*United States v. Judson*, 322 F. 2d 460 (CA 9, 1963), also cited with approval in *Couch v. United States, supra* (p. 330), as involving an instance where possession and ownership are deemed conjoined, although *Judson* involved an attorney successfully making a Fifth Amendment claim on behalf of his client against the compulsory production of his client's books and records in the possession of the attorney.

On the other hand, the functional test of the nature of the organization does embrace a degree of privacy which attends the inspection and disclosure of the records, a degree of intimacy of the information they contain and a field of common endeavor embodying substantially identical (personal) interests of each of the members.

> ". . . the essence of the test, consistent with the privilege's original concern for individual protection, denies the privilege to associations whose interests are predominantly collective. Clearly entitled to assert the privilege under this test are small informal organizations whose members, within the field of common endeavor, have interests identical with those of each other member. To the extent that the membership and scope of group activities enlarge, the area of group purpose common to all members inevitably narrows. The aggregate of group aims no longer coincides with the aims of any member individually, and the group assumes a personality of its own. If a few persons, discharged from employment because of their race, organize to regain their jobs by publicizing their plight, their association embodies their personal interests only. As the membership expands and begins to promote civil rights generally, however, the association at some point loses its personal attributes, and the members become guided by group goals. The development of independent group

identity disqualifies the association from claiming a self-incrimination privilege under the *White* formulation."[5]

Structurally and functionally the instant three-man law partnership did not involve more than the private or personal interests of its members and in no way represented organized institutional activity. Under the Uniform Partnership Act, in effect in Pennsylvania,[6] the partnership's existence depended in no way on state charter, but unlike the corporation, was dependent upon the life of each of the partners.[7] The membership was limited to the chosen three; no new member could join the firm without unanimous consent;[8] it handled only those legal matters which the partners determined, with each of the partners having full authority to bind the partnership in the conduct of the partnership affairs.[9] More important, the partnership books and records, in their creation, maintenance and intimacy were no more distinct from the individually owned books and records of the partners than would be true if each were practicing law as a sole practitioner, having a secretary or bookkeeper keep the entries and having his accountant prepare his tax returns from the information therein contained, with good accounting and business procedures allowing to pass through the sole practitioner's business bank account, expenses which are broken down into business and personal, with personal expenses charged to the proprietor's personal account.

5. H. Robert Fiebach, Constitutional Rights of Associations to Assert The Privilege Against Self-Incrimination, 112 U. of Pa. Law Review 394 (Note).

6. 59 Purdon Pa. Stat. § 1.

7. Ibid. § 93.

8. Ibid. § 51.

9. Ibid. § 31.

Similarly, in the instant case, the nature of the small law firm as a common enterprise and the identity of the limited number of interests of the law partners engaged in practicing their profession, with the books properly recording such items as restaurant charges and country club dues containing elements of both partnership business and individual personal expenses (A. 92-93) and with the right in each of the three partners, but in no others, to inspect the books of accounts, embodies and represents the private and personal interests of each of the members with which each was intimately concerned and involves no waiver of privacy.

In the 30 odd years since *White* denied the privilege to the records of a labor union, this notion of size, impersonality and other circumstances have all been involved in the cases reaching this Court for decision as to the extent to which Fifth Amendment rights may be asserted with respect to business documents which might incriminate a member of an unincorporated association. Thus, although this Court has seemed to stress the question of whether the papers are held in a "representative capacity" on behalf of a "collective group" by a "custodian" performing the "duties of his office" of whom it may fairly be said that "he does not own the records and has no legally cognizable interest in them" (*McPhaul v. United States,* 364 U. S. 372, 380 (1960) (concerned with the Civil Rights Congress); *Curcio v. United States,* 354 U. S. 118, 122-123 (1957) (Labor Union); *Rogers v. United States,* 340 U. S. 367 (1951) (Communist Party); *United States v. Fleischman,* 339 U. S. 349 (1950) (Joint Anti-Fascist Refugee Committee)), the impersonal nature of each organization involved made it clear that no Fifth Amendment privilege pertained to the books and records themselves and the issues before the Court in no way involved the question of whether the

books and records were themselves protected, but rather whether the witness had to explain where they were (*Curcio, Rogers*) or whether he was in possession of them at the time the subpoena to produce was served (*McPhaul, Fleischman*).[10]

In *White*, this Court, had it wanted to, could easily have stated that when more than one person engages in a joint enterprise, the privilege is lost and is allowed only for the sole proprietor. That this Court contemplated that people could associate as partners or jointly with others in a common enterprise and still have the protection of the Fifth Amendment privilege is evident from the use of the plural "constituents" in the impersonality test set forth above, when the Court said that

> "a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely personal interests of its *constituents*, but rather to embody their common or group interests only." (Emphasis supplied.)

By the use of the plural instead of the singular, this Court did and intended to indicate that small organizations such as the intimate association of members of a small law firm continue to embody and represent the purely private

10. Accepting the concession of the government referred to in footnote 3 that compulsory production of books and records pursuant to a subpoena constitutes an incriminating admission of their identity and authenticity, which apparently was what this Court had in mind when it stated in *Schmerber v. California, supra*, p. 763-764:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they may take, and the compulsion of responsives which are also communications, for example, compliance with a subpoena to produce one's papers."

it would seem that the government would be hard put to demonstrate why even a custodial officer holding corporate books and records in a representative capacity would now not be covered by the privilege.

or personal interests of the constituents rather than the common or group interests only.[11]

The government, in its Brief in Opposition to the Petition for Certiorari, does recognize (p. 6) that the Fifth Amendment privilege is not limited to the sole proprietor, and can protect two or more persons joined together in some form of association, but suggests that the *White*

11. A number of District Court cases have faced the question of whether books and records of a small, closely held partnership are "outside the private domain walled by the Fifth Amendment" (A. *5) and have divided on the issue, with only two cases in the Courts of Appeals, both of which easily met the impersonality test of the large enterprise of *White*, discussing the problem. In the District Court, compare *United States v. Cogan*, 257 F. Supp. 170 (S. D. N. Y., 1966); *United States v. Slutsky*, 73-1 U. S. T. C. § 9186 (S. D. N. Y., 1972); *United States v. Lawn*, 115 F. Supp. 74 (S. D. N. Y., 1953); *Subpoena Duces Tecum*, 81 F. Supp. 418 (N. D. Calif., 1948); *United States v. Linen Service Council*, 141 F. Supp. 511 (D. N. J., 1956); *United States v. Brazely*, 268 Fed. 59 (W. D. Pa., 1920) holding the books and records of the small personal partnership to be within the protection of the Fifth Amendment, with *United States v. Garrison*, 348 F. Supp. 1112, 1126 (E. D. La. 1972); *United States v. Bally Manufacturing Co.*, 345 F. Supp. 410, 431 (E. D. La. 1972); *United States v. Onassis*, 125 F. Supp. 190 (D. D. C. 1954); *United States v. Onassis*, 133 F. Supp. 327 (S. D. N. Y., 1955); *United States v. Quick*, 336 F. Supp. 744 (S. D. N. Y., 1972); *In Re Grand Jury Subpoena Duces Tecum*, (D. Md., Civil No. 72-292-B, April 23, 1973) holding that they are not.

The Courts of Appeals cases are *In Re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA 3, 1971) and *United States v. Silverstein*, 314 F. 2d 789 (CA 2, 1963). In *Mal Brothers*, the entity employed 200-250 persons a year, with an annual payroll in excess of $1,000,000 and receipts in excess of $2,000,000 a year, excluding joint ventures with other companies, owned equipment of approximately $1,000,000, with none of the partners being engineers or familiar with the accounting and bookkeeping end of the business. *Silverstein* involved a general partner of five limited partnerships having limited partners numbering from about 25 to 147 and a capitalization of upwards five million dollars, with the managerial general partner working with other peoples' money under defined delegations of authority and responsibility. In addition, the case of *United States v. Warnes*, 157 F. 2d 797 (CA 5, 1946), cited in *Silverstein*, involved a subpoena issued to an officer of various corporate and unincorporated organizations, with the Fifth Amendment privilege denied without any meaningful discussion as to the nature of the organizations.

formulation meant to protect organizations such as family units where personal interests predominate.

Neither *White,* nor any other formulation by this Court draws any significance to the family partnership as distinguished from other closely held, intimately connected partnerships. Involved in this type of case are business books and records. There is no reason why the relationship of a small group of law partners may not be as intimate and personal in their profession as the father and son or brother and sister partnership. See *United States v. White,* 137 F. 2d 24, 26-28 (dissenting opinion) (CA 3, 1943).

It is submitted, therefore, that the *White* case does supply the answer to the question posed by Mr. Justice McKenna dissenting in *Wilson,* where he asks at page 388

> "And what of partnership property, or property otherwise owned in common? Does the degree of interest affect the rule?"

The short answer must be that the business, tax and financial books and records of the small law firm in this case are as protected from compulsory production under a Fifth Amendment claim as are the similar records of the individual proprietor. Although they might not be the "private property" of Petitioner, they are at least in his possession "in a purely personal capacity" (i.e. not as custodian or representative of the firm) to the extent this is legally and factually possible, as co-owner in rightful, lawful possession.

Once it is accepted, as the government concedes, that there exists some form of association which does not lose the protection of the Fifth Amendment, physical possession of its books and records has to reside at any one time in one of the associates, to enable the necessary compulsion to be worked against him. Thus, each of the partners must be

permitted to assert a Fifth Amendment claim regarding actual testimony about the books (*Curcio v. United States*, 354 U. S. 118, 125 (1957)) and the partner in possession, in addition, must be permitted to refuse to deliver the actual books. Petitioner is the possessing partner and the type of possession held by him in this case must qualify for protection or nothing can.[12]

## CONCLUSION.

The books and records of the small, closely held three-man law partnership sought by the federal grand jury subpoena duces tecum fall within the protection from compulsory disclosure under the Fifth Amendment privilege against self-incrimination. They are in the rightful and peaceful possession of Petitioner, disclosure of their contents may tend to incriminate him and response to the subpoena is governmental compulsion directed against himself. The judgment of the Court of Appeals ordering production of the books and records should, therefore, be reversed.

Respectfully submitted,

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12. Although the partnership was dissolved, it was still in the process of being wound up (A. *15) at the time the Grand Jury Subpoena was served on Petitioner. Petitioner does not contend that the dissolution of the partnership gave him a greater privilege with respect to the partnership records than existed during the operation of the partnership. This has been rejected in the corporate field. See *Curcio v. United States, supra* p. 122. Likewise, no suggestion is made that the dissolution takes away any privileges which may exist in the books and records by virtue of the fact that the winding up of the firm is continuing rather than the firm continuing on a current basis.